

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-329-GKF (PJC)
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA’S RESPONSE TO DEFENDANTS’  
JOINT MOTION *IN LIMINE* REGARDING ANY REFERENCE  
TO PRIOR ATTEMPTS TO SETTLE [DKT #2402]**

Plaintiff, the State of Oklahoma (“the State”), hereby submits its response in opposition to Defendants’ Joint Motion *in Limine* Regarding Any Reference to Prior Attempts to Settle (Dkt. #2402) (“Defendants’ Motion”). The State has no objection to the granting of Defendants’ Motion to the extent Defendants seek to preclude from evidence at trial (1) offers to compromise the claims in this lawsuit made in the context of confidential settlement negotiations or (2) statements made in the context of confidential settlement negotiations regarding such claims. To the extent, however, Defendants’ Motion requests an order precluding evidence beyond that scope, the State asserts two objections.

First, Defendants make one passing reference in their Motion to excluding evidence regarding prior attempts to settle “other” disputes between the State and one or more of Defendants. (*See* Motion at 1 (referring to “prior attempts to settle this dispute, *or any others*, between Plaintiff[] and Defendants, or any one of them”) (emphasis added).) Because Defendants’ Motion does not identify “any other” disputes between the State and Defendants, or any one of them, the State is not in a position to comment on the admissibility of such evidence. A party should not have to guess at what exactly is intended to be covered by a motion *in limine*.

Therefore, to the extent Defendants' Motion suggests an order reaching unidentified "other" disputes between the State and one or more of Defendants, it should be denied.

Second, Defendants' Motion also makes reference to – and seeks to preclude the introduction of – public assertions by the State that it was "forced to sue the defendants because defendants refused to settle the case and take responsibility of the litter application." (Motion at 1.) In this regard, to the extent Defendants seek to exclude evidence relating to the State's reasons for bringing the lawsuit against Defendants, Defendants' Motion paints with too broad a brush and should be denied. Defendants' reliance on Federal Rules of Evidence 408(a), 401/402, and 403 and Local Civil Rule 16.2(i) to preclude such evidence is misplaced.

Evidence relating to the State's pre-lawsuit attempts to obtain compliance from Defendants without court action and Defendants' refusal to comply does not fall within the ambit of Federal Rule of Evidence 408. Rule 408 only protects statements that constitute, or are made in pursuit of, a compromise. *Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 12 (1st Cir. 2007). Defendants' pre-lawsuit *refusals* to take responsibility for poultry litter application in the IRW, *refusals* to comply with the law, and *refusals* to compromise do not so qualify and therefore are not protected by Rule 408.

Nor does such evidence fall within the ambit of Local Civil Rule 16.2(i), which speaks to communications relating to or occurring at settlement conferences. *See Alexander v. Philip Morris USA, Inc.*, NO. 06-CV-50-GKF-FHM, 2008 WL 2704464 (N.D. Okla. July 3, 2008).

Moreover, such information is relevant, at a minimum, to the State's claim for civil penalties in Count 7. In Count 7, the State has brought a claim for, among other things, civil penalties for Defendants' violations of the Oklahoma Environmental Quality Code, 27A Okla. Stat. § 2-6-105. (Dkt. #1215 (Second Amended Complaint ¶ 131).) The remedy provision

accompanying 27A Okla. Stat. § 2-6-105, entitled “Violation of Code, order, permit or license or rule – Penalties and remedies,” is 27A Okla. Stat. § 2-3-504, which provides in part: “Except as otherwise specifically provided by law, any person who violates any of the provisions of, or who fails to perform any duty imposed by, the Oklahoma Environmental Quality Code . . . : 2. May be punished in civil proceedings in district court by assessment of a civil penalty of not more than Ten Thousand Dollars (\$10,000.00) for each violation . . . .” 27A Okla. Stat. § 2-3-504(A). Subsection H of 27A Okla. Stat. § 2-3-504 provides that “[i]n determining the amount of a civil penalty the court shall consider such factors as . . . ***the history of such violations*** [and] ***any good faith efforts to comply with the applicable requirements*** . . . .” (Emphasis added.) Evidence of Defendants’ pre-lawsuit *refusals* to take responsibility for poultry litter application in the IRW and *refusals* to comply with the law is directly relevant to the history of Defendants’ violations of the Oklahoma Environmental Quality Code. Thus, Federal Rules of Evidence 401 and 402 do not apply.

Finally, Rule 403 does not support the exclusion of such information. Defendants do not expressly contend that Rule 403 protects against assertions by the State that it was forced to commence this lawsuit because Defendants refused to take responsibility for their poultry waste land application, but to the extent any such argument can be inferred to this subset of evidence that Defendants seek to exclude, the State addresses it here. Simply put, Rule 403 does not protect against the admission of evidence of Defendants’ pre-lawsuit violations, and Defendants have not identified how there is any risk of confusion to the factfinder by hearing such evidence.

In sum, to the extent Defendants seek an order to preclude evidence outside the scope of (1) offers to compromise the claims in this lawsuit made in the context of confidential settlement negotiations or (2) statements made in the context of confidential settlement negotiations

regarding the claims, Defendants' Motion should be denied. The two add-ons Defendants seek simply fall outside the contemplation of the rules governing the exclusion of settlement-related evidence.

For the foregoing reasons, the State respectfully submits that the Court should grant in part and deny in part Defendants' Motion *in Limine* (Dkt. #2402).

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
ATTORNEY GENERAL  
Kelly H. Burch OBA #17067  
ASSISTANT ATTORNEY GENERAL  
State of Oklahoma  
313 N.E. 21<sup>st</sup> St.  
Oklahoma City, OK 73105  
(405) 521-3921

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
David P. Page OBA #6852  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

/s/ Ingrid L. Moll

William H. Narwold  
(admitted *pro hac vice*)  
Ingrid L. Moll  
(admitted *pro hac vice*)  
MOTLEY RICE LLC  
20 Church Street, 17<sup>th</sup> Floor  
Hartford, CT 06103  
(860) 882-1678

Louis W. Bullock OBA #1305  
Robert M. Blakemore OBA 18656  
BULLOCK, BULLOCK & BLAKEMORE  
110 West Seventh Street Suite 707  
Tulsa OK 74119  
(918) 584-2001

Frederick C. Baker  
(admitted *pro hac vice*)  
Elizabeth C. Ward  
(admitted *pro hac vice*)  
Elizabeth Claire Xidis  
(admitted *pro hac vice*)  
MOTLEY RICE LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

Jonathan D. Orent  
(admitted *pro hac vice*)  
Michael G. Rousseau  
(admitted *pro hac vice*)  
Fidelma L. Fitzpatrick  
(admitted *pro hac vice*)  
MOTLEY RICE LLC  
321 South Main Street  
Providence, RI 02940  
(401) 457-7700

Attorneys for the State of Oklahoma

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE LLC	
<b><u>Counsel for State of Oklahoma</u></b>	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<b><u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u></b>	

John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
<b><u>Counsel for Cargill, Inc. &amp; Cargill Turkey Production, LLC</u></b>	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee "Buddy" Chadick	bchadick@bassettlawfirm.com
Vincent O. Chadick	vchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<b><u>Counsel for George's Inc. &amp; George's Farms, Inc.</u></b>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<b><u>Counsel for Peterson Farms, Inc.</u></b>	

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<b><u>Counsel for Simmons Foods, Inc.</u></b>	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<b><u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., &amp; Cobb-Vantress, Inc.</u></b>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
<b><u>Counsel for Willow Brook Foods, Inc.</u></b>	
Robin S Conrad	rconrad@uschamber.com



NATIONAL CHAMBER LITIGATION CENTER	
Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<b><u>Counsel for US Chamber of Commerce and American Tort Reform Association</u></b>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<b><u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u></b>	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<b><u>Counsel for Oklahoma Farm Bureau, Inc.</u></b>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
<b><u>Counsel for State of Arkansas and Arkansas National Resources Commission</u></b>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<b><u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u></b>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<b><u>Counsel for National Chicken Council; U.S. Poultry and Egg Association &amp; National Turkey Federation</u></b>	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net

David E. Choate	dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP	
<b><u>Counsel for Arkansas Farm Bureau Federation</u></b>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<b><u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u></b>	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
<b><u>Counsel for Council of American Survey Research Organizations &amp; American Association for Public Opinion Research</u></b>	

Also on this 20th day of August, 2009, I mailed a copy of the above and foregoing pleading to:

**Thomas C Green** -- via email: tcgreen@sidley.com  
Sidley, Austin, Brown & Wood LLP

**Dustin McDaniel**  
**Justin Allen**  
Office of the Attorney General (Little Rock)  
323 Center St, Ste 200  
Little Rock, AR 72201-2610

**Steven B. Randall**  
58185 County Rd 658  
Kansas, Ok 74347

**Cary Silverman** -- via email: csilverman@shb.com  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)

/s/ Ingrid L. Moll  
Ingrid L. Moll